IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 1930

UNITED STATES OF AMERICA, *Appellants,* *vs.* MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, AND UTAH CONSTRUCTION COMPANY, *Appellees.*	IN EQUITY. *Appeal from Circuit Court, District of Idaho.*

BRIEF FOR APPELLEES

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THE DESERET NEWS

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UNITED STATES OF AMERICA,
Appellant.

vs.

MINIDOKA SOUTHWESTERN RAILROAD COMPANY, and UTAH CONSTRUCTION COMPANY,
Appellees.

BRIEF FOR APPELLEES.

STATEMENT.

In the lower court, the appellant, the United States of America, made an application for an injunction restraining the defendant, the Minidoka & Southwestern Railroad Company, from completing or constructing its railroad across certain lands and canals embraced within the boundary lines of the Minidoka Reclamation Project in Cassia County, Idaho. The substanial facts in this case are not in

dispute, and are that the lands over which defendant was at the date of the application, constructing its railroad, are situated within the Minidoka Reclamation Project;

That on the 7th day of November, 1902, the Secretary of the Interior, by order dated November 12, 1902, under the authority of Section 3 of the Act of June 17, 1902, withdrew from entry, except under the homestead law, the lands described in the bill of complaint, over which said railroad was being constructed, except that the lands in Section Thirty-six (36), Township Ten (10) South, Range Twenty-two (22) East, Boise Meridian, are school lands granted by the United States to the State of Idaho, and that those portions of said Section Thirty-six (36), crossed by said railroad line, have heretofore, since 1902, been sold by the State to private parties;

That the lands crossed by said defendant's line in Sections Nineteen (19) and Twenty (20), of Township Ten (10) South, Range Twenty-three (23) East, Boise Meridian, except the southwest quarter of the southeast quarter of Section Nineteen (19), Township Ten (10) South, Range Twenty-three (23) East, are patented lands for which patent was issued prior to said order of withdrawal;

That after the order of withdrawal above mentioned, as above set out, the lands involved in this suit over which said railroad is constructed and being constructed, are lands in the possession of various persons who had prior to the commencement of

this suit, filed on the same in accordance with the provisions of the homestead laws, subject to the provisions, limitations and charges of the Reclamation Act, said entrymen not yet having made final proof, but each and all of said entrymen prior to the commencement of this suit had conveyed to the defendant railroad company, by good and sufficient deeds, a right of way for its railroad over the lands in questoin, such right of way so conveyed being the land upon which the defendant company is and was at the time of the commencement of this suit, constructing its railroad; (Transcript Pages 115 to 117).

That said railroad company prior to the commencement of this suit had filed with the Secretary of the Interior, a copy of its articles of incorporation and due proofs of its organization as required by the Act of March 3, 1875, and was in such a position as to become specifically a grantee under said act, and at the time of the commencement of this suit was actually engaged in the construcion of its railroad upon the ground. (Transcript pages 108 to 114).

The substantial facts in this case as will be seen, are not in dispute, and the questions of law arise upon the construction and application of certain Acts of Congress, to-wit:

1st.: The general right of way act of March 3, 1875.

2nd: The paragraph of the general appropriation act approved August 30, 1890.

3rd: An act amending Section 2228 Revised

Statutes United States, approved March 3, 1905, and

4th: The Reclamation Act, approved June 17, 1902.

The acts of Congress in so far as they have bearing upon the questions at issue in this case are as follows:

> AN ACT Granting to railroads the right of way through the public lands of the United States.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.
>
> Sec. 2. That any railroad company, whose right of way, or whose track or road-bed upon such right of way, passes

through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road; Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec. 3. That the Legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled 'An act (to amend an act entitled an act) to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and

to secure to the government the use of the same for postal, military and other purposes, approved July first, eighteen hundred and sixty-two, approved July second, eighteen hundred and sixty-four.

Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec. 5 That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

Sec. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved March 3rd, 1875.

18 Statutes at Large, 482.

From General Appropriation Act, approved August 30, 1890:

> "For topographic surveys in various portions of the United States, three hundred and twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eighty-eight, entitled, 'An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes,' as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located, or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.
>
> No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public

lands, or whose occupation, entry or settlement is validated by this act. Provided, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

Section 2288 Revised Statutes of United States:

"Any bona fide settler under the preemption homestead, or other settlement law, shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklohoma, Oregon, South Dakota, Utah, Washington and

Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above states set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act; Provided, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled, "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom; and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

Sec. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works; Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prose-

cuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided. Provided, That the commutation provisions of the homestead laws shall not apply to entries made under this Act.

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon the lands in private ownership which may be irrigated by the waters of

the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any landowner unless he be an actual bona fide resident of such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources

shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act.

Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs, and irrigation works constructed under the provisions of this Act: Provided, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Govenment until otherwise provided by Congress.

Sec. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within

thirty days from the receipt of the application at the Department of Justice.

Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Sec. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this Act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named, for the benefit of arid and semi-arid lands within the limits of such State or Territory: Provided, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semi-arid lands in any particular State or Teritory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable,

to the end that ultimately, and in any event, within each ten year period after the passage of this Act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Approved, June 17, 1902.

ASSIGNMENTS OF ERROR.

By referring to the transcript in this case, it is apparent in the outset that the appellant has not assigned any errors as provided by the statutes and the rules of this court. There are contained in the transcrip, six so-called assignments of error. Not one of thse assignments presents any question of law that can be considered by this court. The assignments amount to nothing more than a statement that the Circuit Court erred in refusing to enjoin the defendants from constructing its railroad. They do not suggest any question of law, and in addition to the fact that no proper assignments of error were filed in the trial court, no assignments of error are contained in the brief. The rule in this regard is

well stated in the case of Doe vs. Waterloo Mining Company, 70 Fed. 455, as follows:

> "Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particularly in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of the court. The assignment of error in question reads as follows: 'There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant.' This is too general. There is no specification showing wherein the decree is not supported by the evidence."

See also:

Deering Harvester Co. v. Kelley, 103 Fed. 261; 43 C. C. A. 225.

McFarland vs. Golling, 76 Fed. 23; 22 C. C. A. 23.

Smith vs. Hopkins, 120 Fed. 921; 57 C. C. A. 193.

United States vs. Lee Yen Tai, 113 Fed. 465; 51 C. C. A. 299.

United States vs. Ferguson, 78 Fed. 103, 24 C. C. A. 1.

Grape Coal Creek Co. vs. Farmers' Loan & Trust Co. 63 Fed. 891; 12 C. C. A. 350.

We also call attention to the fact that neither the assignments of error, nor the citation in this case contain anything which may be considered to be a prayer for reversal as required by Section 997, Revised Statutes.

By reference to the appellant's brief in this case it will be seen how necessary the rules of the court are. In this respect appellant's brief is a mere rambling statement, and contains no argument stating concisely or otherwise any particular proposition of law; and leaves counsel for appellee, and this court, in such a position that it is almost impossible to understand the contention of the government.

ARGUMENT ON MERITS.

If we understand the record in this case, and the points decided by the lower court, and the matters argued in appellant's brief, the questions to be determined are:

1st: May a homestead entryman, whose lands are situated within a reclamation project convey a right of way for a railroad, and if so, what right of possession or title does the grantee obtain by such conveyance?

2nd: Is land situated in a reclamation project and filed upon by a homestead entryman, public lands, and what if any right of way can a railroad company acquire thereover by a compliance with the General Right of Way Act of March 3, 1875?

3rd: Is the right of way for the ditches in question a fee or an easement, and may the government prohibit the crossing of the same?

The first question we will discuss under the general heading:

EFFECT OF CONVEYANCE BY HOMESTEAD ENTRYMAN.

The contention of the United States seems to be that Section 2288 of the Revised Statutes of the United States has no application to reclamation homestead entrymen, and that such a homestead entryman cannot convey to a railroad company a right of way for a railroad across his land prior to the issuance of patent.

The Reclamation Act authorizes two classes of withdrawals, first: It authorizes the Secretary of the Interior to "withdraw from public entry the lands required for any irrigation works contemplated."

Again it authorizes the Secretary "at or immediately prior to the time of beginning the surveys for any contemplated irrigation works to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works."

United States vs Hanson, 167 Fed. 881.

Again it states: That public lands which it is proposed to irrigate "shall be subject to entry only

under the provisions of the homestead laws in tracts of not less than forty or more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms and condition" in the Act prescribed.

We fail to appreciate the argument made by the government in this case. Section 2288 of the Revised Statutes, in terms provides: That any **settler** under the **homestead** law, or other **settlement** law, shall have the right to transfer a right of way across such land, prior to patent, for a railroad. The entry in this case is a homestead entry. It is true that the settler must, before he can acquire his patent, pay the government a proportional cost of the expense of the irrigation works constructed for the irrigation of the land lying within the boundary lines of the Reclamation Project, but that does not, to any extent, or in any way, change the fact that his entry is technically and literally a homestead entry. The wording of the statute seems so plain that it appears to be unnecessary to attempt to construe it. However, it seems that there is no good reason for an attempt to disregard or construe out of the statute that which comes directly within its terms. After a homestead entry is made upon public lands, that land is taken out of the category of public lands, and thereafter a railroad company cannot acquire a right of way thereover by complying with the provisions of the Act of March 3, 1875. As has been stated by the courts many times, the Act of March 3, 1875, was not

intended as a mere gratuity. It was clearly the intention of Congress to encourage the development of the country in those regions which as yet were untraversed by railroads, and thereby to secure public advantages, to subserve the public interest and welfare, by holding out inducements of a free right of way over and across the public lands in order to encourage railroad companies to undertake and complete great and expensive undertakings in the construction of a work which was of a quasi-public character, in and through the undeveloped public lands. The law was intended to promote the interest of the government in opening to settlement, and by enhancing the value of these public lands through or near which a railroad was to be construted, and the grant was not intended as a mere bounty or gift. That being the purpose of the government, and the law being such that a railroad company could not acquire a right of way by virtue of this act over public lands in the possession of settlers or entrymen, for the reason that the courts have construed such lands to no longer be public lands to which the provisions of said act apply after the same have been entered under any of the land laws, it became necessary to make some provision whereby a right of way over such lands could be acquired while the same remained in the possession of an entryman before patent. Hence, Section 2288 of the Revised Statutes of the United States was passed authorizing the settler or entryman to convey in a case where the right of way could

not be secured by virtue of the Act of March 3, 1875. One act is supplementary of the other, and is in pursuance of the same general public purpose.

It is argued by the appellant in this case that the government retains an interest in the entry prior to the time patent is issued, and that such interest the government has a right to protect, but the governmen freely grants to railroad companies rights of way through the public lands. Why, then, should it in the pursuit of any governmental purpose be put out of the power of the railroad company to acquire a right of way where lands are settled upon, or filed upon? It is apparent that such was not the intention of Congress, but the intention was that the government would freely grant a right of way up to the time its public domain was entered upon by settlers or entrymen, and that after such time any entryman or settler could grant the right of way.

If the contention of the government is the correct one, then the deed executed by the settler is absolutely worthless because if the entryman cannot give the railroad company the right to enter upon the land, and construct its railroad, on account of the reversionary interest held by the United States, and the Act of March 3, 1875, does not apply, then there is no way whereby a railroad company can acquire a right of way for a railroad across one of these reclamation projects, but the settlers on the land embraced therein, must be and remain without railroad facilities. And this would also be true if it became neces-

sary to acquire sites for churches, cemeteries and school houses and other public enterprises, or buildings, and in no case could any one acquire a right for any of these public purposes, except by special act of Congress. The contention made by the appellant in this respect is therefore, we conclude, not within the letter of the statute, but directly contrary thereto, and neither is it within the policy of the law, or the intent of the legislative body.

Certainly no good reason can be offered why this act should not apply to homestead entries in reclamation projects. These projects many times are of large area and the purpose of the government in passing the act was undoubtedly to aid in the development of the public domain, and to change the arid places of the west into cultivated fields and thereby be instrumental in building homes for its citizens. In order to carry out this purpose it is clear that the settlers on such arid lands must be in a position to have some other things besides water to irrigate their lands.

They must have railroads upon which to transport their crops to market. Churches in which to worship, schools in which their children may be taught, and places where the dead may be buried, and unless there is some way by which these conveniences may be acquired what person is there who would go upon this land and cultivate and reclaim it? Yet the government in this case says that there is no way un-unless by special act of Congress, because Congress

has provided no general law except the one cited above.

These observations show that if the provisions of the act are open to construction, the construction contended for by the government would be a ruinous one and one which was never intended by the legislature.

Appellant cites in its brief at pages from 28 to 31, numerous cases to the effect that the words of a public grant are to be construed strictly in favor of the government on grounds of public policy. We have read the appellant's brief over carefully with the purpose in view of attempting to arrive at counsel's theory in citing these cases. If any construction of the railroad right of way act is required, it should be construed in the light of the purpose of the government in passing it, and that purpose is well explained in the case of Winona & St. Paul R.R. Co. vs. Barney, 113 U. S. 618; and that purpose was, that railroads should be granted rights of way through the public lands in order to encourage railroad building so that the public domain might be settled up and improved, and as before stated, it would seem that there could not be any more necessary thing than that the settlers thereon should have convenient means of transportation, and the providing of such convenient means of transportation undoubtedly redounds to the advantage of the government in the same way that it would to an individual who gives a right of way through his lands in order to secure a railroad. Coun-

sel attempts to construe Section 5, of the Right of Way Act, although what a construction of that section has to do with the facts involved in this case, is not clear. We remark, however, that it is evident that when Congress used the words "otherwise reserved from sale" they clearly refer to such reservations as are similar to, and within the same class as the particular reservations mentioned. The reservations of the same character as military, park and Indian reservations, and the words "reserved from sale" evidently mean, reserved from disposition under the general laws because no way is provided for obtaining a right of way across lands reserved for such purposes except by treaty stipulation or act of Congress, and it was clearly not the intent of Congress that reclamation projects should be prohibited from having railroads until such a time as Congress should pass special acts allowing railroads to cross such projects, and such would follow as the inevitable conclusion if the word "sale" in this statute is given the construction for which the government contends. Our conclusion is that Congress meant by the words "otherwise reserved from sale" such lands as are reserved from disposition under general laws to be used by the government for some governmental purpose. This question is discussed and we submit a sound conclusion reached by the Supreme Court of Idaho in its decision filed Jan. 28, 1911 in the case of the Minidoka & Southern Rd. Co. vs. Weymouth, et al. We recommend to counsel an earnest consid-

eration of the Biblical quotation "The letter killeth but the spirit giveth life."

DOES THE RIGHT OF WAY ACT OF MARCH 3, 1875 APPLY?

The contention made by the government in this case leads to rather an absurd conclusion. The attorneys for the government have prosecuted this suit to restrain us from building a railroad across the lands in the possession of homestead entrymen, these homestead entrymen having prior thereto conveyed to us the right of way upon which it is being constructed. The government contends that the homestead entrymen have not the power to do this.

It seems clear to us that if this land had not been entered as homestead land, that it would then have been such land as was subject to the right of way act of March 3, 1875, therefore, it seems reasonable that if there is a reversionary interest in the government, that as between the government and the railroad company the government's right has been extinguished by a compliance with that act.

The defendant company prior to the commencement of this suit had filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, so as to place it in a position to become a specific grantee under the provisions of the act. It had also prior to

the commencement of this suit, staked and laid out its road across the lands in question, a grade had been partially constructed, and was under construction, and in the possession of the defendant. It is true the railroad company had not filed a map of definite location, but it had complied with the law so as to bring it within the rule announced in the cases of Railroad Company vs. Jones, 177 U. S. 125; 44 Law Ed. 698, and Oregon Short Line vs. Quigley, 10 Ida. 770.

It cannot be reasonably contended that land situated within the boundaries of reclamation projects is taken out of the category of public lands by the withdrawal made by the Secretary of the Interior. Under this law two forms of withdrawal are provided for as stated by the United States Circuit Court of Appeals, Ninth Circuit in the case of United States vs. Hanson, 167 Fed. 881:

> "That section makes provision for two distinct classes of reservations of public lands for two distinct purposes. It provides, first, that the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc. No exception whatever is expressed as to lands which are authorized to be withdrawn for these purposes. It provides, second, for the withdrawal of any other lands 'believed to be susceptible of irrigation from said works.' Such lands are to be withdrawn from entry, except under the homestead law."

Any citizen who was properly qualified had the legal right after the withdrawal to go to the land office of the district in which the land was situated and file upon the same in accordance with the provisions of the homestead law, that is, the general law of the United States governing homestead entries. Such a filing being subject to the same requirements made in cases of homestead entries generally. It is true that after the irrigation works are constructed, and during their construction, the person making the filing must comply with the additional exactions of the Reclamation Act, but such additional exactions do not in any sense take away from the land its character as public lands.

The question as to what are public lands has been passed upon by the courts many times. The words "public lands" have long had a settled meaning in the legislation of Congress, and when a different intention is not clearly expressed, the term "Public Lands" is used to designate such land as is subject to sale or other disposal under general laws.

Union Pac. Rd. Co. vs. Harris, 215 U. S. 386.

Newhall vs. Sanger, 92 U. S. 761; 23 Law Ed. 769.

Bardon vs. Nor. Pac. R. R., 145 U. S. 535; 36 Law Ed. 806.

Doolan vs. Carr, 125 U. S. 618; 31 Law Ed. 844.

Cameron vs. U. S., 148 U. S. 301; 37 Law Ed. 459.

Mann vs. Tacoma Land Co., 153 U. S. 273; 38 Law Ed. 714.

Barker vs. Harvey, 181 U. S. 481; 45 Law Ed. 963.

Scott vs. Carew, 196 U. S. 100; 49 Law Ed. 403.

A case very much in point is United States vs. Blendaur, 128 Fed. 910, decided by the Circuit Court of Appeals of the Ninth Circuit. The syllabus of that case is as follows:

> "1. Public lands—Forest Reserves —Lands subject to be set apart.
>
> "The 15 townships of land in the Bitter Root Valley, Mont., formerly occupied by the Flathead Indians, which by Act of June 5, 1872, c. 308, 17 Stat. 226, providing for the removal of the Indians therefrom, were made subject to sale, and to which the homestead laws were extended by Act Feb. 11, 1874, c. 25 18th Stat. 15, became a part of the general public domain, and, as such, were subject to the Act of March 3, 1891, c. 561, 26 Stat. 1103, (U. S. Comp. St. 1901 p. 1537), authorizing the President by proclamation to set apart Forest Reservations in 'Public lands.'
>
> "2. Sale—Construction of Statute —Meaning of words 'Public Lands.'
>
> "The words, 'public lands' are not always used in the same sense in acts of Congress, and should be given such meaning in any act as comports with its purpose and intent."

In the body of the opinion the Court uses the following language,—at the bottom of page 912:

> "Lands to which a homestead claim may attach must necessarily be a part of the general public domain, and must be unappropriated lands, not held back or reserved for any special or public purpose."

Certainly there can be no question but that the homestead law is a general law. It is one of the most general laws that we have. It is true that the United States makes provision for the irrigation of the land situated within the boundaries of one of these reclamation projects, and the people who file upon the land must pay for the water, but the land is disposed of under the provisions of the homestead law.

The first syllabus of a case decided by the Supreme Court of Idaho supra, exactly covers this question, and is as follows:

> "Lands withdrawn under the acts of Congress of June 17, 1902, known as the Reclamation Act, for the purpose of irrigation under an irrigation system constructed by the government, and which lands are subject to homestead entry under the act of Congress, are public lands within the meaning of the Act of March 3, 1875, known as the Railroad Right of Way Act, and are subject to railroad rights of way for any railroad company which complies with the provisions of the Act."

It seems evident, therefore, that laying aside any question of the right of the homesteader, this land was such land as was subject to the general railroad right of way act, and so far as the government's rights in it are concerned, if it had any rights, the same had been extinguished by a compliance with that act by the railroad company.

This argument leads us to the conclusion that Congress intended in so far as it was possible to do so, without infringing upon the rights of entrymen and settlers, to freely grant rights of way across the public domain, and that such intention applied to lands situated within reclamation projects subject to entry under the homestead laws. Therefore we submit that the government is not in the slightest way interested in this controversy, or injured by any act of the defendant. If it has a reversionary interest, no reason is apparent why that interest should not pass by virtue of the provisions of the Act of 1875. A lucid exposition of these several Acts of Congress is given in the opinion of the Court below. (Transcript, pages 60 to 77.)

In the case of the United States of America vs. Denver & Rio Grande R. R. Co., 150 U. S. 14; 37 Law Ed. 975, it is said:

> "It is undoubtedly, as argued by the plaintiffs in error, the well settled rule of this court that public grants are construed strictly against the grantee, but they are not to be construed so as to defeat the intent of the legislature, or to

> withhold what is given either expressly or by necessary or fair implication."

In Wiona & St. Paul R. R. Co., vs. Barney, 113 U. S. 618, 28 Law Ed. 1109, Mr. Justice Field, speaking for the court, said, page 625:

> "The acts making the grants are to receive such construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together."

Rule Twenty-four (24) of this Court requires that the brief of the appellant shall contain "a concise abstract or statement of the case; presenting succinctly the questions involved in the manner in which they are raised."

On the first page of the appellant's brief in this case it is stated that "The stipulation contains about as concise a statement of these facts as it is possible to give, and, therefore, they are given in the language of the stipulation." And following that it quotes what the appellant chooses to include. And in this connection we submit it may be justly suggested that it makes in this quotation substantial omissions that indicate a lack of candor and sincerity. It omits the first substantial stipulation contained on page 86, to

the effect that the defendant railroad company is a corporation organized and existing under the laws of the State of Idaho; then follow several stipulations, beginning with the "second" and extending to and including the tenth. It then omits the eleventh and twelfth (page 91 of the Record), and begins with the thirteenth, numbering it as the eleventh, following then with numbers successively but two numbers less than the subsequent numbers as shown in the record. (See Record, pages 91 to 96 inclusive).

The recital as thus made as to the facts stipulated ends with the words "Mr. Robinson's statement," on page 120 of the Record; and omits what follows up to and including the statement of the Court, on page 122, of the words, "This really amounts to a license, then, to construct the railroad upon this land so far as the entrymen is concerned, —so far as he could give the license."

The appellant at page 37 of its brief, under the heading of "Third," having omitted from its statement the matter last above referred to on pages 120 to 122, bases a sophistical argument that the railroad company has obtained no conveyance from the settler in the south half of Section Fourteen (14) Township Eleven (11) South, Range Twenty-two (22) East. The record in this case shows that there is a small piece of this land over which the railroad was being constructed for which no conveyance has been procured, but this particular tract of land was filed upon by a homestead entryman and in his possession.

The facts as to the right of way across this tract of land are: That the entryman thereon who was in possession of it made no objection to the building of the road across it, and the understanding was that settlement would be made with him later, and this homestead entryman stated to the employes of the defendant company in charge of the construction of the road, that they could go ahead and construct the road and that arrangements could be made with him later. (Trans., pages 120, 121, and 122.) This arrangement amounted to a license, and this homestead entryman is not complaining. The defendant company of course assumes that it will have to procure from this entryman a conveyance for this right of way, but that is a matter between the entryman and the railroad company, and is one in which the government is not interested. The cases cited by counsel have no application, and in view of the fact that the entryman agreed that we might go on the land and construct the railroad, and gave us possession, it seems absurd for counsel to attempt at this time to inject into this case this proposition. The cases cited by counsel do not appear to us to have any application at all to the points of law involved in this case.

NATURE OF UNITED STATES TITLE TO ITS DITCHES.

Under the heading designated "Fourth," found at page 39 of appellant's brief, counsel seem to contend that the government has an absolute fee simple title to the ditches which the railroad company crosses with its railroad, and that therefore the railroad cannot cross them. It is manifestly impossible for the railroad company to condemn a right to cross these ditches as condemnation proceedings would not lie against the government, therefore, counsel's contention amounts to this: That where one of these ditches crosses the land of an entryman, or other person, no person may construct a crossing over the ditch unless Congress by special act provides therefor, so we find, that a ditch is constructed under the authority of the government, but no one can cross it. The farmer through whose field it runs may not build a bridge across it so that he can haul crops from one field to another. He may not put a fence across it. In fact this ditch is an absolute barrier to progress, and no person must set a foot upon this sacred ground. It appears clear to us that this right of way for a ditch carries with it only the incidents of an easement in so far as crossing it is concerned. The cases cited by counsel appear to us to have not the slightest application to the matters involved. The railroad company is not attempting to appropriate any part of the right of way, it is simply

attempting to cross the ditches, and in such a manner as to not interfere in any way whatever with the rights of the government to run water therein unobstructed and undiminished in quantity or quality. The government had not withdrawn any rights of way under the first section of the Reclamation Act, but relied upon the act of August 30, 1890 for such rights of way. The trial court in its decree (Transcript, pages 79 to 84) fully and completely protected the rights of the appellant and required the defendant company to so construct the bridges and crossings as to not injure in any way the rights of the government. Therefore, it is our view that there is nothing whatever in the contention of the government in this matter.

In conclusion upon the whole case we desire to state, that the appellant's brief indicates that this is not an attempt on the part of the government to protect any substantial rights that it has, but seems to be an attempt to harrass and annoy the defendant company, and the reason for such position is no where apparent. It seems that instead of attempting to block the building of this railroad, the government ought to encourage it, and thus aid settlers in this section of the country in obtaining means of transportation, but although the government does not want to construct a railroad itself, it seems in this case to be pursuing a "dog in the manger" policy, and the appeal that has been taken in

this case seems to be frivolous and without the slightest merit whatever.

We submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

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